

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Vonage Holdings Corporation)	WC 03-211
)	
Petition for Declaratory Ruling Concerning an Order of)	
the Minnesota Public Utilities Commission)	
)	

**Comments of
Warinner, Gesinger & Associates, LLC (“WGA”)
On Behalf of:**

**Emery Telecom, a Utah ILEC
Holway Telephone Company, a Missouri ILEC
IAMO Telephone Company, a Iowa/Missouri ILEC
KLM Telephone Company, a Missouri ILEC
Lafourche Telephone Company, a Louisiana ILEC
Madison Telephone Company, a Kansas ILEC
Millry Telephone Company, a Alabama ILEC
Mountain Telephone, a Kentucky ILEC
Project Mutual Telephone, a Idaho ILEC**

I. INTRODUCTION

Warinner, Gesinger & Associates, LLC (“WGA”) submits these comments in response to the Federal Communications Commission (FCC or Commission) public notice seeking comments on Vonage's petition for declaratory ruling that its phone-to-phone IP telephony services are classified as an information service posted September 26, 2003.

WGA is a certified public accounting firm specializing in the provision of accounting and consulting services to local exchange telecommunications carriers throughout the United States in which the majority of our clientele are mainly rural Local Exchange Carriers (LECs).

II. IP telephony is just another form of transmission

Today, an end user picks up a phone, listens for a dial tone, dials a phone number provided through the North American Number plan, waits for an answer and then can communicate to someone either next door or as far away as Alaska. The technology used to allow this transmission to travel from one place to another does not change the fact that it is still a phone call. This interexchange call can be transmitted through any number of transmission formats, including copper, fiber, satellite, microwave, or cellular services; all of which do not change the basic premises of a phone call.

IP telephony is just another form of transmission that does nothing more than allow the signal to be sent via a new form of encoding. An IP telephony call is able to travel through the internet, picking the fastest route as it goes, just like a normal phone call might when traveling over an Interexchange Carriers network. There is no "net

change of form or content"¹ in an IP telephony call as Vonage contends. The conversion of a call from analog to the IP format is analogous to digitizing an analog signal in order to send it out over fiber. Even though most telephone companies do in fact have a similar type of signal conversion, they are still classified as providing "telecommunications services." To classify one type of providers of voice service differently based solely on the technology used to convert and then transmit voice signals to their destination would be deliberately inequitable.

III. Phone-to-phone IP telephony services represent telecommunications services

To a consumer receiving an IP telephony call, it is indistinguishable from a normal phone call they might receive via the Public Switched Telephone Network (PSTN). The expectation of any who would use Vonage's service is that precisely what is said on one end of the transmission is heard on the other; thus Vonage's service meets the definition of "telecommunications" under the 1996 Act. The Act states that

“The term 'telecommunications' means the transmission, between or among points specified by the user, of information of the user's choosing without change in the form or content of the information as sent and received.”²

Vonage clearly understands that its "technology" is being used by its subscribers in order to place phone calls. Additionally, Vonage's service does not qualify solely as a computer-to-computer IP telephony service as it openly sells its service as a replacement telecommunications service capable of placing and receiving calls to anyone with a

¹ See Petition for Declaratory Ruling, In the Matter of Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission at page 17.

² 47 USC § 153 (20)

telephone number (including other Vonage customers).³ Vonage performs a net protocol conversion from IP to Time Division Multiplexing (TDM) to PSTN permitting users of broadband Internet connections to communicate with users of the PSTN.³ On its website, Vonage describes itself as "Vonage the broadband phone company" and "The fastest growing telephony company in the US."⁴ Vonage is selling a replacement for traditional phone service by capitalizing on what it describes as "consumer resentment of hidden charges and fees in their phone bills . . . our consumers are leaving conventional telephone service providers for good."⁴

The Commission, in its 1998 Report to Congress, stated that "the classification of a service under the [Telecommunications Act of 1996 (1996 Act)] depends on the functional nature of the end-user offering."⁵ By offering its customers a products that clearly replaces a LEC's service, then Vonage's service is a substitute for "telecommunications services" based on the "functionality" test the Commission defined in the 1998 Report. Vonage is hoping to gain the advantage over its opponents by the use of regulatory arbitrage by being classified as an "information service" and therefore outside the same regulatory structure that its competitors are required to comply with.

³ See Petition for Declaratory Ruling, In the Matter of Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission at page 6.

⁴ Found on the Vonage website, 'Press Releases' area, entitled "Keep Your Phone, Lose Your Old Phone Company" on 10/23/03, located at <http://www.vonage.com/corporate/>

⁵ *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report to Congress, 13 FCC Rcd., 11501 (1998) (1998 Report).

IV. Access is a contributing factor

When a Vonage customer places a telephone call to someone that is not currently using the same Vonage service, that phone call ultimately is transmitted to the receiving party via the PSTN. In some cases, the terminating carrier may already have an interconnection agreement, or something similar, with Vonage. But what about the carriers who do not have an agreement? They are terminating traffic on their networks without being compensated for that usage and in most instances those terminating carriers would be unable to determine where the call originated. Whenever a provider of telecommunications services uses a LEC's network, the LEC is entitled to compensation. Vonage is trying to gain the classification of an "information service provider" in order to circumvent this rule; while being able to sell a competitive product that is, for all intents and purposes, a telecommunications service. If an IP telephony carrier wishes to use a LEC's network, they should be required to report the appropriate usage and remit due compensation.

On October 8, members of the Wireline Competition Bureau met with personnel from Time Warner Telecom to discuss intercarrier compensation and IP telephony traffic.

Ms. Herda, the CEO of Time Warner Telecom stated that:

“The absence of clear rules governing inter-carrier compensation for the exchange of voice over IP ("VoIP" traffic (*i.e.* rules governing the extent to which some or all kinds of VoIP should be subject to either reciprocal compensation or access charges) . . . Ms. Herda stated that one sensible approach would be to presume that all traffic that terminates on the PSTN is subject to terminating switched access.”⁶

⁶ AT&T notice of Ex Parte Meeting in CC Docket 01-92, WC 02-361 and 03-211 filed on October 9, 2003

In an Ex Parte with Commission Staff, Vonage stated that they do not wish this Petition to involve intercarrier compensation, otherwise known as access.⁷ By stating this, Vonage is trying to delay one of the more important, if not the most important issue of IP based telephony; that of compensation by the carriers who terminate calls to LECs over the PSTN. On its website Vonage has even stated that it "pays 'tons' of access fees."⁸ If this is true, why would Vonage not want intercarrier compensation to be a part of this Petition? Vonage hopes that by gaining the title of an "information service" and not a "telecommunications service," it will be able to circumvent current intercarrier compensation rules and avoid the same charges that its current competition, that is traditional phone companies, are required to pay for their use of the PSTN.

Vonage has also made claims that it is unable to determine the origination or termination points of traffic on its network.⁹ While Vonage may be unable to determine the true jurisdiction of a call placed on its network. Vonage's servers must be able to determine how to route calls which will intercept the PSTN. Otherwise how would Vonage be able to offer its user the option of dialing any phone number, like traditional telephone service providers. Vonage is selling a telecommunication service and has the ability to determine the termination point of calls made on its network, and therefore should be subject to similar regulations requiring compensation for network usage.

If IP telephony companies are unable to determine the correct jurisdiction of calls placed using their networks, perhaps the simplest solution would be to adopt a standard

⁷ Vonage notice of Ex Parte Meeting in WC 03-211, CC Docket 96-45, 98-171, 94-102, et al. filed on October 10, 2003

⁸ Found on the Vonage website 'In the News' area, entitled "New Connections: Phone Calls Made Over The Internet Are The Latest Telecom Buzz" (reprinted from the Pioneer Press) on 10/23/03, located at <http://www.vonage.com/corporate/>

⁹ See Petition for Declaratory Ruling, In the Matter of Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission at page Summary iv.

factor, that could be used to determine the total amount of calls that were Interstate and Intrastate. If the FCC were to develop a Percentage Interstate Factor (PIU) for use by IP telephony companies (such as Vonage), then the "impossibility of separating the Internet, or any service offered over it, into intrastate and interstate components,"¹⁰ as Vonage states in its Petition, would become a simple calculation of applying the factor to all the traffic minutes served from Vonage's network.

If Vonage is truly an "information service" one must question why does Vonage "recover required costs of Federal and State Universal Service Funds"¹¹ by adding a \$1.50 charge to each users bill, as stated on its website. Vonage appears to be walking a fine line. In one hand Vonage is stating that it is an "information service" and therefore not subject to the same type and level of regulation as a traditional telephone company; while on the other hand following some of the same regulations that by being an "information service" they are not required to follow.

As the telecommunications industry moves towards evolving technologies to replace (or compete) with traditional telecommunications services this shift will increase the drain on the support base for universal service. This impact will become even more pronounced if providers of IP telephony services, which are functionally the same as traditional telephone services, are not required to contribute to universal service. The obligation upon those who contribute would become even greater if competitors would be exempt from the same regulations. The inclusion of IP telephony and other facilities-

¹⁰ Found on the Vonage website 'Learning Center' area, entitled "12. What are Regulatory Recovery Fee surcharges" on 10/23/03, located at http://www.vonage.com/learn_center.php

¹¹ Federal-State Joint Board on Universal Service, Report to Congress, 13 FCC Rcd. 11501 ¶ 90 (1998 Universal Service Report).

based Internet communications providers in the universal service assessments would increase the contribution base and its long term sustainability.

V. IP telephony needs new classifications to deal with technological advances.

In the 1998 Universal Service Report (Report) the Commission defined what it considered phone-to-phone and computer-to-computer IP telephony calls. At the same time the Commission also emphasized that these were tentative determinations that could be used to address "emerging services" and that it would not make "definitive pronouncements"¹² until it had a more complete and focused view of what IP telephony would develop into as advances pushed the underlying technologies towards becoming a competitive alternative to Plain Old Telephone Service (POTS).

In his dissenting opinion, FCC Commissioner Furchgott-Roth stated that even a set of tentative distinctions between computer-to-computer and computer-to-phone services would be arbitrary because technological advances could produce phones, or other items that could perform the same protocol functions as computers. At that point, there would be no rational basis to subject one service to a "tax" but not the other.¹²

Those technological advances that Commissioner Furchgott-Roth speculated in his dissenting opinion to the FCC's 1998 Universal Service Report have become the basis for many IP telephony services. These technologies are being employed by companies like Vonage in order to offer telecommunications service to customers all over the country, without being burdened by the accompanying Telecommunications regulation,

¹² *Ibid.* Universal Service Report (1998), Furchgott-Roth, Commissioner, dissenting in part

by asserting that they are an "information service"¹³ and therefore do not meet the qualifications described in the 1998 order.

Now, with the emergence of IP telephone as a viable alternative to POTS, along with these technological advances, it is time for the FCC to revisit its tentative determinations of what constitutes IP telephony. IP telephony services are not constrained to two people on computers calling each other, nor are they constrained to using a conventional telephone service to dial into a VoIP provider. IP telephony has become more technologically advanced creating phones and adapters that can be used directly through a broadband connection to make voice calls to anyone on the Public Switched Telephone Network (PSTN) or anyone using similar IP telephony services. This "nascent technology"¹⁴ is beginning to come of age, and it is time for the FCC to review its stance on IP telephony.

VI. OPINION SUMMARY

The transport method used to carry a phone call does not change the fact that it is still a phone call. Technological advances have made IP telephony a viable alternative to switched access with the quality of service, features, options, and pricing all comparable to standard telephony service. Five years ago, the FCC endeavored to create a set of tentative definitions to describe how IP telephony worked at that time. The Commissioners of the time did not mean for those definitions to be arbitrarily used on newer technologies. WGA respectfully requests that the FCC deny Vonage's request for

¹³ 47 USC § 153(20)

¹⁴ Universal Service Report (1998) page 42

a declaratory ruling, and take this opportunity to once and for all clarify that IP telephony is a telecommunications service, and not an information service.

Respectfully submitted,

By: William J. Warinner
Managing Principal
Warinner, Gesinger & Associates, LLC
10561 Barkley Street, Suite 550
Overland Park, Kansas 66212
[Filed Electronically]

October 27, 2003